Supreme Court, U.S.
FILED

(1) 06-776 DEC 4 - 2006

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JAMES E. WEBER, TRUSTEE OF THE JAMES E. WEBER REVOCABLE TRUST U/D 2/18/04, PETITIONER

v.

IOWA STATE BANK AND TRUST COMPANY OF FAIRFIELD, IOWA; IOWA STATE FINANCIAL SERVICES CORPORATION; BILL ADAM; NELSON ANDERSON; JOE CARR; SARAH COCHRAN; DAVID C. EASTBURN; MIKE GREINER; PAT MCMAHON; JAY SILVERMAN; JON SIMPLOT; TOM THOMPSON; STEVE TRIPLETT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can the petitioner be denied standing under the decisions of this Court to challenge the constitutionality of an Iowa statute which inflicts upon him a diminished value for his bank stock as a minority shareholder and subjects him to unfair, different treatment than other stockholders of the bank as well as other stockholders of corporations generally?

2. Do the provisions of an Iowa statute which prevent the petitioner as a minority stockholder in a State bank from obtaining a fair market appraisal of his bank stock for purposes of a buyout deny him the equal protection of the laws?

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The published opinion of the Court of Appeals for the Eighth Circuit in *James E. Weber, Trustee v. Iowa State Bank and Trust Company of Fairfield, Iowa et al.*(C.A. No. 05-4274), reported at 457 F.3d 857, decided and filed August 10, 2006, affirming the District Court's order granting the Respondent Bank's motion for summary judgment and dismissing the action, is set forth in the Appendix hereto(App. 1-3).

The unpublished Memorandum and Order of the United States District Court for the Southern District of Iowa, Central Division, in *James E. Weber, Trustee v. Iowa State Bank and Trust Company of Fairfield, Iowa et al.*(Civil Action No. 4:05-CV-79), dated and filed October 25, 2005, granting the Respondent Bank's motion for summary judgment and dismissing the action, is set forth in the Appendix hereto(App. 4-27).

The unpublished order of the Court of Appeals for the Eighth Circuit in *James E. Weber, Trustee v. Iowa State Bank and Trust Company of Fairfield, Iowa et al.*(C.A. No. 05-4274), decided September 5, 2006, denying the petitioner's timely filed petition for rehearing, is set forth in the Appendix hereto(App. 28).

JURISDICTION

The decision of the United States Court of Appeals for the Eighth Circuit affirming the District Court's order granting the Respondent Bank's motion for summary judgment and dismissing the action was entered on August 10, 2006; and its order denying the petitioner's timely filed petition for rehearing was filed

on September 5, 2006(App.1;28).

The petition for writ of certiorari is filed within ninety (90) days of the date of the court of appeals' denial of the petitioner's timely filed petition for rehearing. 28 U.S.C. Section 2101(c). Revised Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Article III, Section 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, the laws of the United States...; [and] to Controversies...between Citizens of different States....

United States Constitution, Amendment XIV, Section 1:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law....

Iowa Code, Section 490.1302(1)(d):

Shareholders' right to appraisal.

1. A shareholder is entitled to appraisal rights, and to obtain payment of the fair value of the shareholder's shares, in the event of any of the following corporate actions:

....

d. An amendment of the articles of incorporation with respect to a class or series of shares that reduces the number of shares of a class or series owned by the shareholder to a fraction of a share if the corporation has the obligation or right to repurchase the fractional share so created.

Iowa Code, Section 490.1302(4):

Shareholders' right to appraisal.

4. A shareholder entitled to appraisal rights under this chapter is not entitled to challenge a completed corporate action for which appraisal rights are available unless such corporate action meets one of the following standards:

a. It was not effectual in accordance with the applicable provisions of division X [relating to amendment of articles of incorporation and bylaws], XI [relating to merger and share exchange], or XII [relating to disposition of assets] or the corporation's articles of incorporation, bylaws, or board of directors' resolution authorizing the corporate action.

b. It was procured as a result of fraud or material misrepresentation.

Iowa Code, Section 524.1406(3):

Appraisal rights of shareholders

3. a....[I]n determining the fair value of the shareholder's shares of a bank organized under this chapter...in a transaction or event in which the shareholder is entitled to appraisal rights, due consideration shall be given to valuation factors recognized for federal and estate tax purposes, including discounts for minority interests and discounts for lack of marketability. However, any payment made to shareholders under section 490.1324 shall be in an amount not less than the stockholders' equity in the bank disclosed in its last statement of condition..., divided by the number of shares outstanding.

b. Prior to giving notice of a meeting at which a shareholder of a bank organized under this chapter...would be entitled to appraisal rights, such bank...may seek a declaratory judgment to establish the fair value for purposes of section 490.1301, subsection 4, of shares held by such shareholders. Another cause of action or a counterclaim shall not be joined with such a declaratory action....The court shall appoint an attorney to represent minority shareholders....[who] shall select an appraiser to give an opinion of the fair value pf such shares. The bank ...may select an appraiser to give an opinion on the fair value of the shares of the bank...Any shareholder may participate individually and present evidence of the fair value of such shareholder's shares....A judgment in the action shall not determine fair value for a share to be less than the stockholders' equity in

the bank disclosed in its last statement of condition....

STATEMENT

The respondent Iowa State Bank and Trust Company of Fairfield, Iowa (the Bank") began banking operations in 1934. Since 1937, when the grandfather of the respondent David C. Eastburn ("Eastburn") assumed control of the institution, the Bank has been run under the direction of the Eastburn Family. Its shareholders include Eastburn as well as his two sisters, his father and his three children. According to Eastburn, he now runs the entire banking organization.

In 1999, the respondent Iowa State Financial Services Corporation ("the Holding Company" or "the Majority Shareholder") was created in order to acquire all or most of the outstanding shares of the Bank. All of the Directors of the Bank are the directors of the Holding Company. Moreover, the Eastburn Family is the largest shareholder of the Holding Company; and most of the directors of the Bank own shares of the Holding Company. In fact, the Bank's directors receive fees for their services from *both* the Bank and the Holding Company.

The petitioner James E. Weber, trustee of the James E. Weber Revocable Trust ("the petitioner" or "Weber"), now owns 64 shares of Bank stock, a trust res which he inherited from his father, a longtime resident and businessman in Fairfield, Iowa, who acquired the stock more than fifty years ago. He owns the shares outright after the death of his mother who was the principal beneficiary of the stock; he was

designated as the sole beneficiary after her death. The petitioner grew up in Fairfield and because of this inheritance from his father and on account of his own roots in the Fairfield community, his ownership of the Bank's stock has powerful sentimental value which has led him to retain his ownership of these shares over the years.

After its formation in 1999, the Holding Company set about to acquire most of the Bank's shares. In 2000, it offered almost all of the Bank's shareholders the option of transferring their Bank shares into shares of the Holding Company. However, the petitioner along with certain other shareholders who lived outside of Iowa, were *not* offered this opportunity. Instead, the petitioner together with these other out-of-state shareholders were given the choice either of retaining the Bank stock or accepting cash from the Holding Company in return for the stock's surrender. The petitioner chose to keep his Bank stock.

By June 30, 2004, the Holding Company owned 14,695 shares or 91.84% of the Bank's 16,000 outstanding shares of stock with the remaining 1,305 shares or 8.16% of Bank stock owned by eighteen (18) individuals, the petitioner among them. Operating as the Bank's majority shareholder by far, with the same directors as the Bank and almost the same shareholders, the Holding Company received income, other than its own investment income, principally from the profits which the Bank paid to it in the form of dividends.

Before June of 2004, the Bank's excess liquidity led its directors, i.e., the same directors who controlled

the Holding Company, to invest the Bank's excess funds in Certificates of Deposit with other financial institutions, investments which gave the Bank a return of 3.60% interest. However, at the same time, the Bank's directors realized in 2002 and 2003 that its dividend payments to the petitioner and other minority stockholders amounted to about a 10% yield, *three times* more than the Bank's investment return on Certificates of Deposit with other financial institutions.

In a calculated attempt by the Holding Company to acquire for itself the approximately 7% difference in return between the Bank's investment of 3.60% in Certificates of Deposit and the 10.00% yield the Bank was obligated to pay its stockholders in dividends, the Bank's board of directors in the fall of 2004 began the process of a "reverse stock split," a procedure whereby the Bank would reduce the number of outstanding shares in its company, making the resulting shares worth more and leaving the minority stockholders possessing just fractional shares which would then be purchased for cash by the Holding Company(A. 5;23-24). As the district court found, "the goal of the reverse stock split was to eliminate all the Bank's shareholders except the Holding Company"(App. 5-6). In addition, the Holding Company would have access to the entire earning stream of the Bank and could look forward to having this newly acquired and valuable bank stock appreciate over time.

In September of 2004, the Bank's board of directors—the same board of directors which governs the Holding Company----voted to proceed with the reverse stock split and consolidate the Bank's shares into one shareholder, the Holding Company(App. 6). As

part of this process, the Bank hired an appraisal firm to conduct an assessment of the Bank's stock, knowing that the appraiser would eventually value the Bank's stock at no greater than book value, i.e., the difference between the Bank's assets and liabilities as valued on its books of account, divided by the number of shares.

The appraisal firm determined that "the fair market value of a *non-controlling, non-marketable* interest in the common stock of Iowa State Bank and Trust Company of Fairfield, Iowa, as of June 30, 2004, was $484 per share"(App. 6)(emphasis supplied). It did so consonant with the terms of Iowa Code Section 524.1406(3)(a), which provides that "in a transaction or event in which the shareholder is entitled to appraisal rights, due consideration shall be given to valuation factors recognized for federal and estate tax purposes, including discounts for minority interests and discounts for lack of marketability."

With knowledge of how the Bank's stock was valued, i.e., that it accommodated discounts for the fact it belonged to a minority stockholder and that it lacked some marketability as such, the Bank's directors on September 20, 2004, adopted the value of $484 for each of the petitioner's 64 shares of Bank stock. It then passed a resolution approving the reverse stock split so that the number of outstanding shares of the Bank were reduced so that the shares of the minority stockholders like the petitioner were reduced to just a fractional share, leaving him with the prospect of accepting cash from the Bank as a buyout for his former shares.

On October 18, 2004, Bank's directors notified the petitioner and the other minority stockholders of

the shareholder meeting on October 28, 2004, for a vote on the proposed reverse stock split. Specifically, the shareholders were to consider whether to approve a reverse stock split of the Bank's common stock on the basis of one share for each 1,469.5 shares then owned "and for cash payments in lieu of fractional shares that would otherwise be issued"(App. 7). By setting the ratio at 1,469.5:1, the Bank guaranteed that all shareholders except the Holding Company would end up with fractional shares. Because a proposed amendment to the Bank's articles of incorporation (which was also to be voted on at this meeting) would prohibit any stockholder from owning a fractional share, the Bank would then cash out all of the minority stockholders.

According to the Bank's notice, this transaction would result not only in the Holding Company owning all of the Bank's common stock but also "in a savings of time and expense for administrative matters relating to shareholders and give [the] Bank more flexibility in responding to matters that require shareholder approval and capital funding matters"(App. 7). Finally, the Bank's notice addressed the stockholders' appraisal rights, giving a brief summary of a shareholder's right to seek appraisal of the stock's value and attaching a copy of Iowa Code, Section 524.1406(3)(a), the statute governing appraisal rights.

On October 25, 2004, the petitioner wrote Eastburn as chairman of the Bank's board of directors objecting to the reverse stock split for the sole purpose of eliminating the minority stockholders. Pointing to the directors' fiduciary responsibility toward *all* the shareholders, including the minority stockholders, the

petitioner wrote:

> If the corporation stock were to be sold, all of the minority stockholders participate in substantially more than book value of the corporation....I do not think [that marketability and minority] discounts should be utilized for the sole purpose eliminating 18 shareholders for a reduced value of the stock. I do not believe the Iowa statutes can be relied upon to avoid [the directors'] fiduciary responsibility.

(App. 8-9). The petitioner therefore refused to appoint a proxy, told Eastburn to record his negative vote at the meeting and promised to begin a civil action in order to determine whether the Board's action in pursuing this reverse stock split was consonant with its fiduciary duties and whether the Iowa statutes could be relied upon to terminate his interest in the Bank(App. 8-9).

The amendment containing the reverse stock split passed with more than 93% of the shareholders voting in its favor. The petitioner was given the choice of accepting book value for his shares or seeking appraisal rights under the Iowa statute (Iowa Code, Section 524.1406(3)(a)) which required that the stock's value be discounted for its minority status and its lack of marketability.

Instead of pursuing his appraisal rights, the petitioner on November 8, 2004, began this civil action against the Bank, the Holding Company and the members of their Boards of directors challenging the reverse stock split in the federal district court for the Southern District of Florida. After its transfer to the

federal district court for the Southern District. of Iowa, the petitioner filed an amended complaint which alleged all of the facts recited here and claimed that the Bank directors' resort to this reverse stock split contravened the fiduciary duties they owed the minority stockholders and that the appraisal statute it relied upon to accomplish this split (Iowa Code, Section 524.1406(3)(a)) denied him the equal protection of the laws guaranteed him under the fourteenth amendment. He sought rescission of the stock split together with an award of damages.

After filing an answer to the petitioner's amended complaint, the Bank moved for summary judgment in its favor on the grounds that the petitioner lacked standing to challenge the validity of Iowa Code, Section 524.1406(3)(a) since he never pursued his appraisal rights thereunder and that the all the directors were insulated from liability because they relied upon the advice of competent legal counsel.

On October 25, 2005, the federal district court, Longstaff, C.J., issued a decision granting the Bank's motion for summary judgment(App. 4-27). Finding no disputed facts, the motion judge determined as a matter of law that under Iowa Code, Section 490.1302(1)(d), a reverse stock split gave the petitioner appraisal rights; that none of the exceptions described in Iowa Code, Section 490.1302(4) excusing him from exercising his appraisal rights applied; and accordingly, having failed to exercise his appraisal rights, he was barred from challenging the reverse stock split because it was a "completed corporate action"(App.14-16).

As the district judge concluded,

> [w]hile this Court can sympathize with the fact that Weber and other minority shareholders were essentially forced to sell their stock when they wanted to retain it, Iowa law allows for such an action by the Bank. Iowa law also explicitly provided Weber as a minority shareholder, with a remedy should he be unhappy with the Board's decision to proceed with a reverse stock split. Weber chose to file this lawsuit rather than pursue the remedy given to him under Iowa law. By doing so, he forfeited his chance to challenge the reverse stock split or the appraisal that set the compensation for his shares.

(App. 16-17).

The district court further ruled that, in any event, like "freeze out" mergers, a reverse stock splits is acceptable corporate behavior as long as it is done for a proper business purpose and minority shareholders are offered fair appraisal rights(App.17-19). It determined that both conditions were met here: reducing the shareholders to just one, the Holding Company, was a legitimate business purpose and Iowa law provides for appraisal rights(App. 19).

Turning to the petitioner's challenge to the constitutionality of Iowa Code, 524.1406(3) which governs appraisals of bank stock as opposed to non-bank stock, the district court refused to consider the issue because Weber failed to pursue his appraisal rights under the statute and since it has never been applied to him, he lacked standing to raise the issue of its constitutionality(App. 20-21).

Finally, the lower court concluded that the Bank's directors followed the statutory requirements for accomplishing a reverse stock split, engaged the services of competent counsel and hired an experienced appraisal firm(App. 21-22). Moreover, the transaction was fair to the corporation and for all these reasons, there was no breach of their fiduciary duties to the minority stockholders and no self-dealing(App. 21-23).

On August 10, 2006, in a short *per curiam* opinion, the court of appeals for the Eighth Circuit affirmed the district court's ruling(App. 1-3). On September 5, 2006, the same court denied the petitioner's timely filed petition for rehearing(App. 28). The petitioner has now petitioned this Court for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

REASONS FOR GRANTING THE PETITION

1. The Decision Below Denying The Petitioner Standing To Challenge The Constitutionality of Iowa Code, Section 524.1406(3)(a) Fundamentally Conflicts With The Decisions Of This Court.

In his amended complaint, the petitioner alleged that on November 24, 2004, the Bank notified him that his shares of common stock in the bank had been converted into a right to receive cash from the Bank in the amount of $491.38 per share, an amount which represented the then book value of each share. In order to collect this sum ($31,448.32), the petitioner was required to endorse his stock certificates and send them to Eastburn's address in Fairfield, Iowa.

As the petitioner alleged, the Bank also notified him that he had appraisal rights pursuant to Iowa Code, Section 524.1406(3)(a), a copy of which had been given to him. It provided in pertinent part:

> ...[I]n determining the fair value of the shareholder's shares of a bank organized under this chapter...in a transaction or event in which the shareholder is entitled to appraisal rights, due consideration shall be given to valuation factors recognized for federal and estate tax purposes, including discounts for minority interests and discounts for lack of marketability....

Accordingly, the petitioner alleged that the Bank gave him a choice either to accept book value for his shares---the lowest, most depressed kind of value which could be attributed to his shares---or seek appraisal rights under an Iowa statute which in determining the fair value of his shares mandates consideration that his stock belongs to a minority shareholder and that it lacks marketability as such.

The petitioner alleged that this so-called exclusive statutory "remedy" under Iowa Code, Section 524.1406(3)(a), providing him with appraisal rights as an option to a cash buyout based upon the stock's depressed book value was no remedy at all since in computing the stock's "fair" value, the appraisal process here, unlike any other statutory appraisal process, unfairly mandates discounts for minority interests and for the lack of marketability. He therefore refused to resort to this unfair and defective appraisal process and claimed *inter alia* that Iowa Code, Section

524.1406(3)(a), denies him the equal protection of the laws in violation of the fourteenth amendment.

Moreover, the petitioner claimed that even if Iowa Code, Section 524.1406(3)(a) is constitutional, the Bank's directors and the Holding Company had breached their fiduciary duties of loyalty, honesty and to refrain from self-dealing which it owed to him as a minority shareholder when they forced him for no sound business reason to accept cash for a depressed book value of his shares in the Bank or to resort to the unfair appraisal process of Iowa Code, Section 524.1406(3)(a).

All of these allegations, never disputed as a matter of fact upon summary judgment and raising only issues of law, were sufficient to establish that the petitioner has standing to challenge the constitutionality of Iowa Code, Section 524.1406(3)(a), which, when applied, unfairly denied him the right to a fair appraisal of his stock as a minority shareholder in the Bank. There was no requirement that the petitioner embark on the defective, unfair procedure of Section 524.1406(3)(a)'s appraisal process, one which by its plain terms would discount his shares for their minority interest and their lack of marketability, before challenging it on equal protection grounds. He had the right to make these claims as soon as he was put to the choice of either using this procedure or accepting cash from the Bank's directors for his shares based upon their book value.

This reverse stock split was engineered by the Bank's directors in order to drive the petitioner and the other minority shareholders from the bank for no

reason except to leave the Holding Company as the Bank's sole stockholder. Forcing the petitioner within days of its scheduled shareholder meeting to pursue the unfair appraisal process under Section 524.1406(3)(a) was part of their scheme to coerce the minority shareholders to acquiesce in the reverse stock split. If the petitioner chose the appraisal process, as the Bank's directors and the statute invited him to do, "he was stuck with the result of that appraisal," *Beerly v. Department of Treasury*, 768 F.2d 942, 948(7th Cir. 1985), unless the process was later adjudged to be devoid of due process, a defect which would have invalidated the appraisal *ab initio. Id.*

However, if the plain terms of Section 524.1406(3)(a) are reasonably read, the appraisal remedy would not have possibly resulted in a fair price being paid for the petitioner's shares because under the statute, discounts *must* be taken for the shares' minority interest and their lack of marketability. Accordingly, if the petitioner had chosen to seek his appraisal rights under Iowa statutory law, he would have been pursuing a process whereby he could not possibly have received a fair price for his bank stock; and the Bank would have later claimed that by pursuing this defective process, the petitioner had waived any constitutional claim except for a lack of due process in the way it was carried out.

The law does not require a putative plaintiff to perform futile acts; it does not require that he pursue self-defeating, useless proceedings by which "he [would be] stuck with the result of [the] appraisal," *Beerly, supra,* in order to challenge on equal protection grounds the very process which led him to this result.

The law does not demand that he squander his rights to a fatally defective process in order to validate his constitutional challenge to this process.

The petitioner possessed the standing to challenge on equal protection grounds this process —a process unfair to any owner of *bank* shares---as soon as the Bank's directors imposed upon him the choice of using this skewed process, accepting cash for his shares based upon a depressed book value or bringing this suit to challenge the validity of the appraisal process.

The lower courts' decisions to the contrary denying standing to the petitioner here conflict fundamentally with this Court's decisions which hold that a person who is forced to engage in an unfair statutory or regulatory process in order to protect his property or liberty interests has standing to challenge that statutory or regulatory process when he suffers a loss or an injury which is causally connected to the defendants' conduct in seeking to impose upon him this unfair statutory or regulatory process, a loss or an injury which can be redressed in this lawsuit.

The underpinning of the standing requirement is found in Article III Section 2, which imposes a "case or controversy" limitation on federal jurisdiction. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180(2000). "Determining that a matter before the federal courts is a proper case or controversy under Article III therefore assumes particular importance in ensuring that the Federal Judiciary respects 'the proper—and properly limited—role of the courts in a democratic society.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S.___, ___(2006)(Roberts, C.J.) quoting *Allen v.*

Wright, 468 U.S. 737, 750(1984) and *Warth v. Seldin*, 422 U.S. 490, 498(1975).

The "case or controversy" requirement also has importance in maintaining the "tripartite allocation of power" set forth in the Constitution. *Id.* citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474(1982) quoting *Flast v. Cohen*, 392 U.S. 83, 95(1968). No principle is more fundamental to the judiciary's proper role in this system of government than the constitutional limitation to actual cases and controversies. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. at___, citing *Raines v. Byrd*, 521 U.S. 811, 818(1997) and quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 37(1976). Article III enforces this constitutional limitation on the federal judiciary. *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11(2004).

In order to insure that the federal courts entertain live cases or controversies rather than render advisory opinions without consequence, Article III demands that a litigant possess standing in order to invoke the authority of these courts. Over the years, this Court's decisions have established that the irreducible constitutional minimum of standing contains three elements: (1) an injury in fact, i.e., an invasion of a legally protected interest which is concrete and particularized, actual or imminent, and not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of, i.e., the injury has to be fairly traceable to the challenged action of the defendant rather than the independent action of some third party not before the court; and (3) the likelihood

that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561(1992). *Allen v. Wright*, 468 U.S. at 751.

The petitioner's challenge to the operation of Section 524.1406(3)(a) meets every one of these requirements of standing. In the first place, there has been an injury in fact to the petitioner, i.e., he has been forced by the respondents' conduct together with the operation of Section 524.1406(3)(a) to accept less than the fair value of his shares in the Bank. This is a particularized, concrete, imminent, non-speculative and certain harm which can be redressed in this proceeding through the invalidation of the statute itself as applied to the petitioner or by the award of damages. See *Lujan*, 504 U.S. at 561-562. Contrast *DaimlerChrysler Corp. v. Cuno*, 547 U.S. at___(no *personal* injury in allegations by taxpayers of tax breaks which violate the Commerce Clause). See also *Marbury v. Madison*, 5 U.S.(1 Cranch) 137, 170(1803)("The province of the court is, solely, to decide on the rights of *individuals*.")(emphasis supplied).

Second, there is a causal connection between the petitioner's injury or loss and the respondents' conduct. That is, the injury to the petitioner is fairly traceable to the challenged action of the respondents rather than the independent action of some third party not before the court. As alleged and undisputed on this record, the Bank's directors engineered this reverse stock split in order to drive the petitioner and the other minority shareholders from the bank for no reason except to leave the Holding Company as the Bank's sole stockholder. Forcing the petitioner within days of its scheduled shareholder meeting to pursue the unfair

appraisal process under Section 524.1406(3)(a) was part of their scheme to coerce the minority shareholders to acquiesce in the reverse stock split.

In these undisputed circumstances, the petitioner has standing to challenge the constitutionality of Section 524.1406(3)(a) "insofar as it has an adverse impact on his own rights." *Ulster County Court v. Allen*, 442 U.S. 140, 154-155(1979). Contrast *Broderick v. Oklahoma*, 413 U.S. 601, 610(1973)("...a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may be applied unconstitutionally to others, to situations not before the court."). The statute, imposed upon him by the respondents' self-dealing conduct designed to coerce the petitioner to forego his right to be fairly reimbursed for his minority ownership in the Bank, operates *on him* and constricts *his* appraisal rights incident to this reverse stock split. A causal nexus between the harm or loss which the petitioner has suffered and the respondents' conduct has therefore been made out.

Finally, "[i]t can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to [the respondents'] illegal conduct at the time of suit, a sanction that effectively abates that conduct and prevents its reoccurrence provides a form of redress." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. at 185-186. Here the certain harm caused the petitioner by the respondents' insistence on a flawed, unconstitutional and unfair appraisal process under Section 524.1406(3)(a) can be redressed in this proceeding through the invalidation of the statute itself

as applied to the petitioner or the award of damages which compensates him for the fair value of his shares in the Bank.

For all of these reasons, the decision below denying the petitioner standing to challenge the constitutionality of Iowa Code, Section 524.1406(3)(a) fundamentally conflicts with the decisions of this Court.

2. The Iowa Statutory Scheme Providing the Petitioner Appraisal Rights Denies Him The Equal Protection Of The Laws.

Whether characterized as a "freeze out" merger, *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991) *passim*, or a reverse stock split, the Bank's action in seeking a buyout of all of its minority shareholders invoked state statutes, Section 524.1406(3)(a) among them, which when applied to the petitioner as a minority stockholder subjected him to different treatment than other stockholders of the bank as well as other stockholders of corporations generally and therefore denied him the equal protection of the laws in realizing his right to a fair appraisal of his bank stock.

Specifically, the respondents' conduct in forcing the petitioner to accept cash for his shares at book value or to resort to the provisions of Section 524.1406(3)(a) in order to realize a cash reimbursement for his minority shares in the bank, an unfair process which mandates discounts for the shares' minority interests and for their lack of marketability, exposes the petitioner to a diminished return for his ownership in the bank and results in illegal, disparate treatment of

the petitioner denying him the equal protection of the law in two ways:

(1) the petitioner is offered cash or relegated to an unfair appraisal process for cash, one discounted for the stock's minority interest and its lack of marketability; he is *not* offered stock in the Holding Company like the majority shareholders and is therefore treated differently to his detriment than the majority shareholders of the Bank for no rational reason related to sound business practices; and

(2) the petitioner, a holder of *bank* shares, is relegated to an unfair appraisal process designed to minimize his interest in the bank and he is therefore treated differently to his detriment than other shareholders of other corporations generally for no reason rationally rooted in the law. This is the basis of the petitioner's equal protection claim which the lower federal courts should have considered on the merits.

First, the Majority Shareholders' initial offer to pay the petitioner "book value" as compensation for his shares in the Bank rings hollow. "Book value" is a virtually meaningless index of what a stock is worth to the shareholder and it is regularly rejected in the appraisal process as unreliable and misleading. *Beerly v. Department of Treasury*, 768 F.2d at 946-947. *Yabsley v. Conover*, 644 F. Supp. 689, 694(N.D. Ill. 1986). As these courts have recognized, the book value of a stock accommodates the original cost of the firm's assets, as depreciated; and, apart from the vagaries of depreciation, these assets may have very little value in relation to the firm's actual earnings. *Beerly, supra.* Nor does the book value of a bank's share accurately represent the current value of the bank as a going

concern. *Yabsley, supra.*

On top of this,

> "[t]he appraisal process will tend to produce conservative results where the values are speculative, and the majority's power to pick the time at which to trigger appraisal may encourage them to move when full values may be temporarily obscured. Thus the very cases in which the majority may be most tempted to seek a freeze out are those where it is most difficult to assess the full value of the minority's shares."

Vorenberg, J., *Exclusiveness of the Dissenting Stockholders's Appraisal Right*, 77 Harv. L. Rev. 1189, 1202-1203(1964).

Yet the law provides that the very purpose of an appraisal is to give the owner of the property being appraised the fair cash equivalent of what he has given up by relinquishing his ownership. *Beerly*, 768 F.2d at 946. In the case of stock, what the petitioner gives up is the opportunity to sell his stock *or to keep it and obtain income from it. Id.* In this sense, the "fair value" of minority stock must calculate the value of the corporation as a whole as a going concern and then award a *pro rata* share of that value to the dissenting shareholder(s) because "[t]his valuation reflects the shareholder's actual interest in the company prior to the corporate change, independent of market variables or influences, and dictates that the fair value of a dissenters' minority share *should remain equal to the majority share.*" *Swope v. Siegel-Robert, Inc.*, 243 F.3d 486, 492(8th Cir. 2001) (emphasis supplied) citing

Dreiseszun v. FLM Indus., Inc., 577 S.W.2d 902906(Mo.Ct.App. 1979)(the classification of stock as minority or majority shares must *not* affect actual value).

Moreover, there should be no discount for the minority shares' lack of marketability. Especially with "freeze outs" or reverse stock splits engineered by a majority of stockholders, the real objective is to ascertain the actual worth of that which the dissenter shareholder loses. Note, *Valuation of Dissenters' Stock Under Appraisal Statutes*, 79 Harv, L. Rev. 1453, 1456 n.18(1966) citing *Warren v. Baltimore Transit Co.*, 154 A.2d 796, 799(Md. 1959). Lack of marketability does not inform this assessment because the minority shareholders "are not willing sellers" and because imposing a marketability discount "would benefit the majority shareholders at the expense of the minority shareholders...." *Swope v. Siegel-Robert, Inc.*, 243 F.3d at 493. If there is a ready market for the minority's shares, it is the *majority shareholders* or the corporation itself, resulting in a windfall to those already in control. *Id.* at 493-494 quoting *First Western Bank Wall v. Olsen*, 621 N.W.2d 611(S.D. 2001).

This law properly acknowledges the plight of minority shareholders in the midst of mergers, freeze outs and reverse stock splits; and it reflects the longstanding equitable tradition in American jurisprudence of protecting minority shareholders so that they receive equal treatment. See, e.g., *Southern Pacific Co. v. Bogert*, 250 U.S. 483, 487-488(1919). See also *Aaron v. SEC*, 446 U.S. 680, 709-712(1980)(Blackmun, J., concurring in part and dissenting in part); *NoDak Bankcorporation v. Clarke*, 998 F.2d 1416, 1425-1426(8th Cir. 1993)(Heaney, J.,

dissenting).

As Judge Heaney observed, minority shareholders of any corporation, including banks, have the right "to be treated on the same basis as the majority shareholder....[They should not] be forced to accept cash while allowing the majority to receive stock...."*Id.* at 1426. *Accord, Lewis v. Clark*, 911 F.2d 1558, 1561(11th Cir. 1990).

Yet Iowa Code, Section 524.1406(3)(a) makes absolutely no accommodation for these genuine valuation concerns with minority shareholders of bank stock. It allows the Majority Shareholder to offer cash to the petitioner for his stock or to relegate him to an unfair appraisal process for cash, one discounted for the stock's minority interest and its lack of marketability. The petitioner was *not* offered stock in the Holding Company like the majority shareholders were and he was therefore treated differently to his detriment than the Majority Shareholder for no rational reason related to sound business practices. A denial of the equal protection of the laws has therefore been made out. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881-882(1985). Compare *Hodel v. Indiana*, 452 U.S. 314, 323-324(1981).

Second, while "banking and related financial activities are of profound local concern," *Northeast Bancorp v. Board of Governors, FRS*, 472 U.S. 159, 177(1985) quoting *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 38(1980), there is no rational reason rooted in economic reality why the shareholders of bank stock must pursue their appraisal rights burdened by the statutory requirement under Section

524.1406(3)(a) that their shares be discounted because of their minority interest or because they lack marketability *when no other analogous corporate appraisal procedure contains this restriction.* See *Community Bank of Arizona v. G.V.M. Trust*, 366 F.3d 982, 989(9th Cir. 2004). See also *NoDak Bankcorporation v. Clarke*, 998 F.2d at 1424(banks no different than other corporations for purposes of freeze out mergers). This disparate, unequal treatment itself amounts to a denial of the equal protection of the laws.

This conclusion in turn invokes a consideration of whether the Majority Stockholder undertook this reverse stock split for a sound business reason or for the sole purpose of eliminating all the minority shareholders in order to consolidate complete ownership of the Bank in the Holding Company. As the district court found, "the goal of the reverse stock split was to eliminate all the Bank's shareholders except the Holding Company"(App. 5-6). In addition, the Holding Company would have access to the entire earning stream of the Bank and could look forward to having this newly acquired and valuable bank stock appreciate over time. Buying out the minority shareholders, including the petitioner, at an unreasonably low price leaving just one shareholder for the Bank may be a convenient strategy for the Majority Shareholder but it does not qualify as a sound business decision and the lower courts were wrong to conclude otherwise.

Besides lacking a sound business purpose, the reverse stock split foisted on the minority shareholders amounted to a breach of the Bank directors' fiduciary duties they owed the minority shareholders of loyalty, honesty, good faith and to refrain from self dealing. As

Justice Brandeis wrote in *Southern Pacific Co. v. Bogert*, 250 U.S. at 487-488,

> [t]he majority has the right to control; but when it does so, it occupies a fiduciary relation toward the minority [shareholders], as much so as the corporation itself or its officers and directors. If through that control a sale of the corporate property is made and the property acquired by the majority, the minority may not be excluded from a fair participation in the fruits of the sale.

Id.(footnote omitted). *Accord, Securities Comm'n v. Chenery Corp.*, 318 U.S. 80, 85-86(1943) (Frankfurter, J.).

For all of these reasons, the provisions Section 524.1406(3)(a) denied the petitioner the equal protection of the laws by preventing a fair appraisal of his bank stock and forcing him to exercise his appraisal rights as a minority stockholder in a manner which was inconsistent with and detrimental to his actual proportionate ownership of the Bank. In the end, the reverse stock split engineered by the Bank's directors "was, at best, a clever little scheme having only the color of legality and cannot be upheld." *Bloomington Nat. Bank v. Telfer*, 916 F.2d 1305, 1309(7th Cir. 1990) quoting *Bloomington Nat. Bank v. Telfer*, 699 F. Supp. 190, 194(S.D. Ind. 1988).

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eighth Circuit and, ultimately, to vacate the judgment and remand the matter to the District Court for a trial on the petitioner's claims or to provide the petitioner with such other relief as is fair and just in the circumstances.

Respectfully submitted,

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(any footnotes trail end of each document)

No. 05-4274

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

James E. Weber, Trustee of the James E. Weber Revocable Trust u/d 2/18/04,

Plaintiff-Appellant,

v.

Iowa State Bank and Trust Company of Fairfield, Iowa; Iowa State Financial Services Corporation; Bill Adam; Nelson Anderson; Joe Carr; Sarah Cochran; David C. Eastburn; Mike Greiner; Pat McMahon; Jay Silverman; Jon Simplot; Tom Thompson; Steve Triplett,
Defendants-Appellees.

457 F.3d 857

May 17, 2006, Submitted

August 10, 2006, Filed

JUDGES: Before WOLLMAN, BRIGHT, and BOWMAN, Circuit Judges.

OPINION: PER CURIAM.

James Weber, a former shareholder of Iowa State Bank and Trust Company of Fairfield, Iowa ("the Bank"), sued the Bank over its decision to enact a reverse stock split that effectively eliminated Weber's shares. The district court[1] granted the Bank's motion for summary judgment, dismissing Weber's action, and Weber now appeals. We affirm.

We state the undisputed facts. For more than fifty years, Weber, a Florida resident, held a minority of shares in the Bank. In 1999, defendant Iowa State Financial Services ("Holding Company") formed to purchase the Bank's outstanding shares. Most of the Bank's shareholders were given the option to transfer their shares in the Bank into Holding Company shares. Weber, along with certain other shareholders outside of Iowa, was not given the option to transfer his shares; he was given the choice of keeping his Bank stock or accepting cash for the shares. Weber chose to keep his shares in the Bank.

In the fall of 2004, the Bank decided to effectuate a reverse stock split for the purpose of eliminating the Bank's minority shareholders. This would allow the Bank to reduce some costs and simplify some corporate procedures. The Bank informed Weber that he could seek an appraisal if he felt the Bank had underpaid him for his shares. Weber did not seek an appraisal. Instead, he filed the instant lawsuit, contesting the Bank's right to engage in a reverse stock split.

Iowa law specifically states that an appraisal is the sole and exclusive remedy for a shareholder in the event of a reverse stock split.[2] Iowa Code § 490.1302(4). Under section 490.1302(4)., a shareholder is "not entitled to challenge a completed corporate action for which appraisal rights are available." As the district court observed in its expansive and well-reasoned opinion, this shareholder and appellant completely failed to follow the statutory prerequisites for a determination of the value of his stock above what the Bank offered. Under these circumstances, the district court properly dismissed Weber's claim. Weber v. Iowa State Bank of Fairfield, Iowa, et al, No. 4:05-CV-79 (Oct. 25, 2005).

(Weber does not assert that he meets either of the listed exceptions.)

We AFFIRM.

Footnotes

n1 The Honorable Ronald E. Longstaff, United States District Judge for the Southern District of Iowa.

n2 Iowa Code section 490.1302(4). states

> A shareholder entitled to appraisal rights under this chapter is not entitled to challenge a completed corporate action for which appraisal rights are available unless such corporate action meets one of the following standards:
>
> a. It was not effectuated in accordance with the applicable provisions of division X, XI, or XII or the corporation's articles of incorporation, bylaws, or board of directors' resolution authorizing the corporate action.
>
> b. It was procured as a result of fraud or material misrepresentation.

No. 4:05-CV-79
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JAMES WEBER, Trustee of the James E. Weber Revocable Trust u/d 2/18/04 Plaintiff,

v.

IOWA STATE BANK AND TRUST COMPANY OF FAIRFIELD, IOWA, an Iowa Corporation, IOWA STATE FINANCIAL SERVICES CORPORATION, an Iowa corporation, BILL ADAM, NELSON ANDERSON, JOE CARR, SARAH COCHRAN, DAVID C. EASTBURN, MIKE GREINER, PAT MCMAHON, JAY SILVERMAN, JON SIMPLOT, TOM THOMPSON, and STEVE TRIPLETT Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THE COURT HAS BEFORE IT defendants' motion for summary judgment, filed August 11, 2005. Plaintiff resisted on August 31, 2005. Defendants filed a reply brief on September 13, 2005. The matter is considered fully submitted.

I. BACKGROUND

Plaintiff, James Weber ("Weber"), is a former shareholder of defendant, Iowa State Bank and Trust ("Bank"). All shares of the Bank are now owned by a holding company, defendant Iowa State Financial

Services Corporation ("Holding Company"). The dispute in this case centers around the Bank's decision to eliminate all shareholders except the Holding Company.

The following facts are either not in dispute or are viewed in the light most favorable to the nonmoving party, Weber. The Bank has been in existence since 1934. Pl. App. at 4, 9. In 1999, the Holding Company was formed to purchase the outstanding shares of the Bank. Pl. App. at 4, 9. All of the Directors of the Bank are also Directors of the Holding Company. Pl. App. at 4, 10. As of June 30, 2004, the Holding Company owned 91.84% of the Bank's issued and outstanding shares of stock. Pl. App. 4, 9. The remaining 8.16% was owned by 18 individual shareholders. Pl. App. at 4, 9.

In 2000, after the Holding Company was established, most of the Bank shareholders were given the option to transfer their Bank shares into Holding Company shares. Def. App. at 3. Weber,[1] along with certain other shareholders who lived outside the state of Iowa, was not given the option to transfer his shares into Holding Company shares. Def. App. at 3. Rather, at that time, Weber was given the choice between keeping the bank stock or accepting cash for the shares. Def. App. at 7. Weber choose to keep the Bank shares. Def. App at 7.

Between the time when the Holding Company was established and November of 2004, the Bank and the Holding Company operated with two sets of shareholders and two Boards of Directors (albeit the same Directors served on both boards). Def. App. at 2. In the fall of 2004, the Bank began the process of a reverse stock split.[2] Def. App. at 2. The goal of the

reverse stock split was to eliminate all the Bank's shareholders except the Holding Company. Def. App. at 2. As a result of this consolidation of shareholders, the Bank would reduce at least some of its administrative costs and procedures. Def. App. at 2. For example, if the Bank needed to raise capital, it would not need to offer stock and issue a prospectus. Pl. App. at 130. Rather, the Holding Company could simply write a check to the Bank for the additional capital. Pl. App. at 130. The Bank would also reduce administrative costs by not devoting the time and resources to administering the records of two sets of shareholders - one for the Bank and one for the Holding Company. Pl. App. at 130.

In September of 2004, the Bank's Board of Directors ("Board") voted to proceed with the reverse stock split and consolidate the shares of Bank stock into one shareholder - the Holding Company. Def App at 4. Before proceeding with the reverse stock split, the Bank hired an appraisal firm, Business Capital Corporation ("Business Capital"), to conduct an appraisal of the Bank's stock. Def. App. at 35. Business Capital determined:

> Based upon the entire analysis, and for the purpose described in this selfcontained appraisal report, it is our opinion that the fair market value of a noncontrolling, non-marketable interest in the common stock of Iowa State Bank and Trust Company of Fairfield, Iowa as of June 30, 2004 was $484 per share.

Def. App. at 35.

After the Board voted to proceed with the reverse stock split, notice of a special shareholder meeting was sent to the Bank's shareholders on October 18, 2004. Def. App. at 14. This notice informed shareholders that a meeting would be held:

To consider whether to approve and adopt an amendment to the Articles of Incorporation of the Bank that provides for a reverse stock split of the common stock of the Bank on the basis of one share for each 1,469.5 shares now owned and for cash payments in lieu of fractional shares that would otherwise be issued.[3]

Def. App. at 14. The relevant amendments to the Articles of Incorporation and resolutions to be considered at the meeting were attached to this notice. Def. App. at 15-18. Weber admits that he received this notice. Def. App. at 9. This notice also included an information statement, which explained the effect of approving the amendment, including a statement which read:

> the Amendment and the resulting reverse stock split will have the effect of the Bank re-acquiring all shares of New Common Stock except for those issued to Iowa State Financial Services Corporation [Holding Company]. After the effective date of the amendment, Iowa State Financial Services Corporation [Holding Company] will be the only shareholder of the Bank.

Def. App. at 19-20. This information statement also explained the reasons for the Amendment:

> the transaction will result in a savings of time and expense for administrative matters relating to shareholders and give Bank more flexibility in responding to matters that require shareholder approval and capital funding matters. The transaction will result in Iowa State Financial Services Corporation [Holding Company] owning all of the New Common Stock.

Def. App. at 20. Finally, the notice of shareholder meeting sheet addressed appraisal rights. First, the information sheet gave a summary description of the right of a shareholder to seek appraisal rights. Def. App. at 21. Second, the statutes governing appraisal rights were attached to the end of the notice. Def. App. at 24-33.

On October 25, 2004, Weber sent a letter to David Eastburn ("Eastburn"), the Chairman of the Board of Directors for the Bank. Pl. App. at 285. In this letter, Weber stated that he objected to the plan to eliminate the 18 minority shareholders, but would "not ... appoint a proxy under these circumstances." Pl. App. at 286. He stated that he believed Eastburn could "register [his] vote as a negative" without any other formal requirement and requested that Eastburn do so. Pl. App. at 286. In this letter, Weber also explained his basic theory that drives the action now before the Court - that "notwithstanding the Iowa statutes involving corporations ... there is something wrong with utilizing Iowa statues to adopt a reverse stock split in order to eliminate 18 shareholders of a corporation." Pl. App. at 285. Thus, in this letter, Weber informed Eastburn of his intent to file a declaratory judgment action to "determine whether the action of the Board of

Directors complies with their fiduciary responsibilities and whether the Iowa statutes can be relied upon to terminate [his] interest as a shareholder under the above facts." Pl. App. at 286. The Amendment was passed by a vote of the shareholders on October 28, 2004 with more than 93% of the shareholders voting in favor of the amendment.[4] Def. App. at 130.

On November 8, 2004, Weber filed a lawsuit in the Untied States District Court for the Southern District of Florida challenging the reverse stock split. The Florida District Court transferred the case to this district in February of 2005 following a motion by the Bank to do so.

II. APPLICABLE LAW AND DISCUSSION

A. Summary Judgment Standard

Summary judgment is properly granted when the record, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Walsh v. United States, 31 F.3d 696, 698 (8th Cir. 1994). The moving party must establish its right to judgment with such clarity there is no room for controversy. Jewson v. Mayo Clinic, 691 F.2d 405, 408 (8th Cir. 1982). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. " Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). An issue is "genuine," if the evidence is sufficient to persuade a reasonable jury to

return a verdict for the nonmoving party. Id. at 248. "As to materiality, the substantive law will identify which facts are material .... Factual disputes that are irrelevant or unnecessary will not be counted." Id.

B. Material Facts in Dispute

In their Statement of Undisputed Facts, the defendants set forth several facts that relate to conversations between the Bank's legal counsel and various defendants. Statement of Undisputed Facts at Pars. 4, 5, 10, 12, 13. Essentially, the Bank and the Directors state that (1) Weber was not offered stock in the Holding Company because the stock offering laws of Florida made doing so onerous and expensive, see id. at Pars. 4, 5; (2) the Bank's counsel advised it to "consummate a reverse stock split to eliminate its last few minority shareholders," see id. at Par. 10; and the Bank did so under the advice of counsel, see id. at Par. 13; and (3) that the Bank asked whether it could simply exchange shares of the Bank stock for Holding Company stock and counsel informed the Bank that there were complications which prevented doing so, see id. at Par. 12. To support these asserted undisputed material facts, the Bank cites to Eastburn's deposition.

In his Response to the Defendants' Statement of Undisputed Facts, Weber either denies the statements or states that his response is "qualified." Response to Defendant's Statement of Undisputed Facts at Pars. 4, 5, 10, 12, 13.

- With respect to the Bank's assertion that it did not offer Weber an exchange of his stock for stock in the Holding Company because of

Florida's securities laws, Weber argues that Eastburn's deposition is not sufficient evidence, "Eastburn is not a lawyer, Eastburn's testimony is hearsay, he is not qualified to state a legal conclusion, and the record is devoid of any affidavit, deposition or written opinion of a lawyer." Id. at Pars 4, 5.

- Where the Bank asserts that counsel advised it to consummate a reverse stock split, see id. at Par. 10, Weber states, "Qualified. There is nothing in the record from any bank's counsel to support this alleged fact and Defendant, Eastburn's deposition is based on hearsay. Additionally, the alleged material fact is overly broad and cannot either be admitted or denied.,, Id. at Par. 10.
- When the Bank stated that it inquired about exchanging Bank stock for Holding Company stock but was informed by its counsel that there would be complications, see id. at Par. 12, Weber responded, "Qualified. This is vague and ambiguous and cannot be admitted or denied. Also, the record is devoid of any deposition of a lawyer, affidavit of a lawyer, or written opinion of a lawyer." Id. at Par. 12.
- Finally, in response to the Bank's statement that it proceeded with the reverse stock split on the advice of counsel, see id. at Par. 13, Weber responded, "This is vague and ambiguous and cannot be admitted or denied. Testimony about bank counsel's advice is hearsay. There is no deposition testimony of any lawyer, any affidavit of any lawyer, or written opinion of any lawyer." Id. at Par. 13.

Based on Weber's responses, this Court must determine whether there is a material dispute of fact sufficient to deny summary judgment.

Essentially, all of the facts Weber claims are in dispute derive from the fact that Eastburn, and not the Bank's counsel or another attorney, is the source of the Bank's claim that it relied on the advice of counsel in proceeding with the reverse stock split. Apparently, according to Weber, the only evidence that would sufficiently support these claims would be the testimony of an attorney or some other attorney-created documents.

Although the Court reviews the facts in the light most favorable to Weber, once the moving party has met its initial burden of identifying "those portions of `the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact,"Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)), the nonmoving party cannot "simply rest on mere denials or the allegations in the pleadings." Carter v. St. Louis Univ., 167 F.3d 398, 401 (8th Cir. 1999). Rather, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Weber cannot "simply create a factual dispute; rather, there must be a genuine dispute over those facts that could actually affect the outcome of the lawsuit." Carter, 167 F.3d at 401. Furthermore, under the local rules of this Court, the nonmoving party must support all statements that are not expressly admitted with citations to the pleadings, depositions, answers to interrogatories, admissions, exhibits and affidavits that

support the refusal to admit the statement. L. R. 56.1. "Failure to respond, with appropriate citations to the appendix, to an individual statement of material fact constitutes an admission of that fact." L.R. 56.1.

Here, Weber has not shown that there is a genuine dispute of material fact that would affect the outcome of the lawsuit. To the contrary, Weber has made unsupported denials and responded to several of the Bank's factual assertions as "qualified" without giving any support in the record for his position. This is in violation of the local rules. L.R. 56.1. This is not a situation where the nonmoving party has highlighted contrary evidence, which raises a dispute that must be resolved at trial. Rather, Weber essentially objects to the type of evidence the defendants have chosen to use in supporting their facts. Weber apparently believes that Eastburn's deposition is not sufficient to support the factual assertions. This Court does not agree. The factual statements to which Weber objects all relate to the reasoning behind decisions made by the Bank's Board. Specifically, Weber questions the Bank's assertion that in each situation the Board made its decision on the advice of counsel. As President of the Holding Company, Board member on both the Bank's and the Holding Company's board of directors, and Chairman of the Bank, Eastburn is in a position to testify regarding the actions of the Bank's Board. Eastburn's deposition provides competent evidence of how and why the Board acted in commencing the reverse stock split and in declining to offer Weber shares of the Holding Company. That Weber would prefer testimony from the Bank's attorney or documents from that attorney does not make Eastburn's evidence invalid.[5] Weber has not pointed to

any evidence that would lead this Court to believe that a reasonable trier of fact could find in Weber's favor on this factual issue. Anderson, 477 U.S. at 248.

Finally, even if this Court were to find that there were facts in dispute, such a dispute would not be material when viewed in light of the law in this case. Grey v. City of Oak Grove, 396 F.3d 1031, 1034 (8th Cir. 2005) ("the dispute must be outcome determinative under prevailing law"). As explained below, Weber has forfeited his right to challenge the corporate action in this case. Therefore, even if this Court found that the question of whether the Bank acted on the advice of counsel was in dispute, such a disputed fact would be irrelevant in light of Weber's failure to abide by the Iowa Code.

C. Validity of the Reverse Stock Split Under Iowa Law

Weber seeks relief in this Court based upon his assertions that (1) the Bank pursued the stock split not for legitimate business purposes, but so that the Holding Company and its shareholders could profit; and (2) that he was denied worthwhile dissenter's rights because Iowa's statutory scheme for minority shareholder's appraisal rights is unconstitutional. Before reaching either of Weber's claims, however, this Court must determine whether Weber even can pursue his claims in this Court. As explained below, answering this question proves to be dispositive-because Weber was entitled to appraisal rights under the Iowa Code, he cannot challenge a completed corporate action. Iowa Code § 490.1302 (4).

1. Weber's Ability to Challenge the Reverse Stock Split Iowa Code § 490.1302(4) states:

> A shareholder entitled to appraisal rights under this chapter is not entitled to challenge a completed corporate action for which appraisal sights are available unless such corporate action meets one of the following standards:
> (a) It was not effectuated in accordance with the applicable provisions of division X [relating to amendment of the articles of incorporation and bylaws], XI [relating to merger and share exchange], or XII [relating to disposition of asserts] or the corporation's articles of incorporation, bylaws, or board of directors' resolution authorizing the corporate action.
> (b) It was produced as a result of fraud or material misrepresentation.

(emphasis added).

Here, the "completed corporate action" is the reverse stock split initiated by the Bank. Accordingly, if Weber was entitled to appraisal rights, and neither of the two exceptions applies, Iowa law explicitly prohibits Weber from challenging the reverse stock split.

A shareholder is entitled to appraisal rights under Iowa law in the event of several corporate actions including:

> An amendment of the articles of incorporation with respect to a class or series of shares that reduces the number of shares of a class or series owned by the shareholder to a fraction of a share

> if the corporation has the obligation or right to repurchase the fractional shares so created.

Iowa Code § 490.1302(1)(d). Thus, Weber was entitled to appraisal rights because the reverse stock split reduced the number of shares owned by a class of shareholders to a fraction of a share and the Bank was obligated to buy back the remaining fractions of shares. Therefore, Weber may only challenge the reverse stock split if one of the two statutory exceptions applies.

Weber does not and cannot argue that either statutory exception applies. With respect to section 490.1302(4)(a), there is no evidence that the transaction did not comply with Iowa law, or the corporation's articles of incorporation, bylaws or the resolution authorizing the reverse stock split. Nor is there any evidence of fraud or misrepresentation necessary to meet the exception under section 490.1302(4)(b). Consequently, this case does not fall within either exception.

Because Weber was entitled to appraisal rights and has not provided any evidence meeting either exception under the Iowa statute, Weber is statutorily barred from challenging the reverse stock split. While this Court can sympathize with the fact that Weber and other minority shareholders were essentially forced to sell their stock when they wanted to retain it, Iowa law allows for such an action by the Bank. Iowa law also explicitly provided Weber, as a minority shareholder, with a remedy should he be unhappy with the Board's decision to proceed with a reverse stock split. That remedy was to seek appraisal rights. Weber chose to file this lawsuit rather than pursue the remedy given to

him under Iowa law. By doing so, he has forfeited his chance to challenge the reverse stock split or the appraisal that set the compensation for his shares. See Iowa Code § 490.1302(4).

2. Legality of the Reverse Stock Split

Even if this Court were to entertain Weber's challenge to the reverse stock split, it would nevertheless find the split valid corporate action under Iowa law and the law of the Eighth Circuit. First, the Iowa Code explicitly allows for a Bank to, "effect a reverse stock split or similar change in capital structure by renewal, amendment, or restatement of existing articles of incorporation, provided the requirements of the superintendent are satisfied." Iowa Code § 524.1509. Weber has not alleged that the reverse stock split failed to meet the requirements of Iowa law.

Second, in NoDak Bancorporation v. Comptroller of the Currency, 998 F.2d 1416 (8th Cir. 1993), the Court of Appeals for the Eighth Circuit addressed the question of when a bank may force minority shareholders to accept cash in exchange for shares, and concluded that so long as it is done for a proper business purpose and minority shareholders are offered dissenter's rights, such corporate tactics are permissible. Although NoDak addresses the legality of what are commonly described as "freeze out" mergers under the National Bank Act, its analysis is applicable to reverse stock splits under state law as well. See NoDak, 998 F.2d at 1417 n.1.

In NoDak, the stock of Liberty National Bank and Trust Corporation was owned by the Dickinson

Bancorporation, which owned 73% of the stock, NoDak Bancorporation, which owned 21% of the stock, and private individuals who owned the remaining 6%. Id. Liberty's Board of Directors approved a plan where Liberty would merge into a newly created bank, New Liberty, which was a wholly-owned subsidiary of Dickinson. Id. In the process, the minority shareholders of the original Liberty would be entitled to exchange their shares only for cash, leaving Dickinson as the sole remaining shareholder. Id. at 1418. NoDak objected to the plan because it did not wish to have its stock cashed out. Id.

NoDak argued that the plan lacked a legitimate business purpose, that the majority shareholders had breached their fiduciary duties, and that the plan would result in a "squeeze out" of the minority shareholders for less than fair market value. Id. In rejecting NoDak's arguments, the court reasoned that modern law is moving away from the protection of minority shareholders and toward a corporate system which allows tactics such as freeze out mergers. NoDak, 998 F.2d at 1423 ("[u]nder the modern view, the shareholders' only entitlement is to demand an appraisal of their shares, a remedy that does not give dissenting shareholders any element of value attributable to the transaction from which they dissent" (quoting Esterbrook and Fischel, The Economic Stricture of Corporate Law 134 (1991)). Thus, the Court focused on whether minority shareholders were given proper appraisal rights. NoDak, 998 F.2d at 1424.[6]

The NoDak Court also recognized that allowing tactics, such as freeze-out mergers, that consolidate stock ownership into one person or entity is beneficial to a

bank. NoDak, 998 F.2d at 1422 (" [f]reeze out mergers facilitate 100% ownership, which in turn affords a bank greater flexibility and expedites consolidation"). Thus, the court rejected NoDak's claim that elimination of the minority shareholders was not a proper business purpose. Id.

From NoDak, some general conclusions can be drawn. First, consolidation of stock ownership, and the benefits of having one shareholder can be a legitimate business purpose justifying corporate tactics which eliminate minority shareholders. See Nodak, 998 F.2d at 1422-23. Second, in order for such tactics to be valid, minority shareholders must be given appraisal rights. Id. at 1424.

Here, the requirements of NoDak are met. First, the Bank's desire to reduce the number of shareholders to one, the Holding Company, is a legitimate business purpose. As in NoDak, the Bank would receive the economic and logistical benefits that come from having one shareholder. See NoDak, 998 F.2d at 1422. Second, because Iowa law provides for appraisal rights in stock split situations, see Iowa Code 490.1302(1)(d), and Weber was provided with those rights, the second requirement of NoDak is also met. See NoDak, 998 F.2d at 1424.

Accordingly, even if Weber was able to challenge the corporate action, it meets the requirements set forth by the Iowa statutes and the Eighth Circuit.

3. The Constitutionality of Iowa's Appraisal Statute

Next, Weber asserts that Iowa Code section 524.1406, which governs appraisals of bank stock as opposed to non-bank stock, is unconstitutional. This statute requires that, "in a transaction or event in which the shareholder is entitled to appraisal rights, due consideration shall be given to valuation factors recognized for federal and estate tax purposes, including discounts for minority interests and discounts for lack of marketability." Iowa Code § 524.1406 (3)(a). Weber argues that because discounts for minority interests and lack of marketability are required in appraising bank stock, but not in appraising the stock of other non-bank corporations, the Iowa statute violates the Equal Protection Clause of the Fourteenth Amendment.

The defendants in this case argue that Weber cannot raise a constitutional challenge to the appraisal statute because he chose not to take advantage of his appraisal remedy. Thus, not only is he barred by the statute from challenging the corporate action, as discussed above, but he does not have standing to challenge the appraisal remedy itself. Def. Br. at 19-20. It is true that, "while federal courts are obliged to decide constitutional questions when necessary to the resolution of a dispute before them, `they have an equally strong duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration.'" United States v. Turechek, 138 F.3d 1226, 1229 (8th Cir. 1998) quoting County Court v. Allen, 442 U.S. 140, 154 (1979). Thus, it would be inappropriate for this Court to examine the constitutionality of an Iowa statute which was never applied to Weber.

Weber has failed to meet the basic requirements of standing: injury in fact, causation, and redressability. Delorme v. United States, 354 F.3d 810, 815 (8th Cir. 2004). Weber has not suffered an injury because the appraisal statute has never been applied to him.[7] For this reason, even if this Court were to accept Weber's argument that the statute is unconstitutional, such a favorable decision would do nothing to redress his claimed injury. Because Weber's stock was never appraised under the challenged statute, removing the offending provisions of the statute would in no way change Weber's current position. Had Weber sought an appraisal through the remedy provided by the Iowa code, perhaps this Court could consider his constitutional argument. Because he never employed the remedy provided under the law, however, he does not have standing the challenge the law.

D. The Liability of the Bank's Directors

Weber also contends that the Directors are individually liable for breach of their fiduciary duties. Essentially, Weber charges that Directors profited personally from forcing minority shareholders to sell for less than the fair value of the stock. In Iowa, a director shall not be liable unless a party asserting liability establishes that a director did not, "discharge his duties on the board ... (1) in good faith; and (2) in a manner the director reasonably believes to be in the best interest of the corporation." Iowa Code § 490.830(1).

1. The Directors exercised appropriate care.

A director must exercise "the care that a person in a like position would reasonably believe appropriate

under similar circumstances." Iowa Code § 490.830(2). A director may rely on "information, opinions, reports, or statements" provided by others as long as the director "reasonably believes [these people] to be reliable." Iowa Code § 490.830(4)-(5).

Here, the Directors expressly followed the statute's requirements for a reverse stock split. Iowa Code § 524.1509. The Directors sought advice and analysis of an attorney and an appraisal firm. Although Weber objects to the type of factors considered in the appraisal, there is no evidence that the appraisal was not conducted in an objective manner. These proactive steps demonstrate that the Directors acted reasonably in making their decision and valuing the stock and therefore complied with their fiduciary duty to exercise care.

2. The Directors did not violate their duty of loyalty.

Weber relies on Ryan v. Tad's Enterprises, Inc., 709 A.2d 682 (Del. Ch. 1996), to advance the argument that the business judgment rule will not apply when the majority of the decision-makers have a material conflict of interest in the decision. This Court need not rely on Delaware law, however, because the Iowa statutes set out when a director's conflict of interest will amount to a breach of fiduciary duty. Iowa Code section 490.832(1) provides that a conflict of interest exists where "the director of the corporation has a direct or indirect interest in the transaction." A director has an indirect interest if the director has a material financial interest in another entity that is a party to the transaction. Iowa Code § 490.832(2)(a).[8] The statute, however, provides a

"safe harbor" provision for the Directors when the "transaction was fair to the corporation." Iowa Code § 490.832(1)(c). Accordingly, the key question here is whether the transaction was fair to the corporation. Hanrahan v. Kruidenier, 473 N.W.2d 184 (Iowa 1991). In such a situation, the director has the burden to prove the conduct was fair. Id. at 188.

The Defendants have met this burden. The Directors simply sought to achieve a legitimate business purpose - a unified shareholder - through a statutorily established method - a reverse stock split. Iowa Code § 524.1509 (permitting reverse stock split); NoDak, 998 F.2d at 1422 (describing unified stock ownership as beneficial to a Bank). Furthermore, by asking an independent, third-party expert to conduct a valuation of the shares, the directors made a good effort to ensure that the minority shareholders were paid a fair price. Accordingly, this Court finds that the reverse stock split was fair to the corporation and the Directors did not violate their duty of loyalty.

III. CONCLUSION

For the reasons stated above, the motion for summary judgment by the Defendants is GRANTED.

Footnotes

fn1 In 2000, Weber was not actually the owner of the shares. He was, however, the trustee of the shares for the benefit of this mother and was designated as the sole beneficiary after her death. Def. App. at 7.

fn2 A reverse stock split is defined as a:

> Procedure whereby a corporation reduces the number of shares outstanding. The total number of shares will have the same market value immediately after the reverse split as before it, but each share will be worth more. For example, if a firm with 10 million outstanding shares selling at $10 a share executes a reverse 1 for 10 split, the firm will end up with 1 million shares selling for $100 each.

John Downes, et al., Dictionary of Finance and Investment Terms 519 (Barron's Educational Series, Inc. 5th ed.) (1998).

fn3 By setting the reverse stock split ration at 1,469.5:1, the Bank guaranteed that all shareholders except the Holding Company would be left with a fractional share after the reverse stock split. Because the amendment also prohibited holding a fractional share, the Bank would then cash out the minority shareholders.

fn4 Given that the Holding Company owned 91.84% of the Bank's stock before the reverse stock split, the fact that 93% of the shareholders voted in favor of the amendment essentially means that the Holding Company and perhaps a few additional shareholders voted in favor of the amendment. It appears that the majority of the minority shareholders did not vote for the amendment.

fn5 Weber also raises an objection to hearsay in his response to the defendant's statement that "counsel advised it to consummate a reverse stock split to eliminate its last few minority shareholders." Response to Defendants' Statement of Undisputed Facts Par. 10;

Statement of Undisputed Facts Par. 10. This statement is being used to show why the Board offered the reverse stock split and cash buy out and is therefore admissible because testimony from a witness about factors on which they relied for their own actions are admissible as non-hearsay. Wolf v. Brown, 128 F.3d 682, 685 (8th Cir. 1997).

fn6 While NoDak focuses on force out mergers, it did briefly reference reverse stock splits as well. In NoDak, the court referenced Bloomington National Bank v. Telfer, 699 F. Supp. 190 (S.D. Ind. 1988) aff'd 916 F.2d 1305 (7th Cir. 1990), which addressed reverse stock splits. NoDak, 998 F.2d at 1424. The NoDak court distinguished the case because in Bloomington the reverse stock split was invalid primarily because it lacked an appraisal remedy for the dissenting shareholder. NoDak, 998 F.2d at 1424 ("[t]his language reinforces our conclusion that freeze out mergers are completely acceptable so long as the dissenting shareholders are given their appropriate appraisal remedy"). In affirming the District Court, the Seventh Circuit wrote:

> "The bank's reacquisition of capital stock, at a price significantly lower than the current stipulated value, combined with an avoidance of appraisal rights for the minority shareholders, is not in accordance with ... the National Banking Act. Bloomington has attempted to do nothing more than squeeze-out the minority shareholders by repurchasing its stock and reducing it to fractional shares through a reverse stock split, thereby necessitating the bank's purchase of the fractional shares. The district

> court correctly concluded that the bank's plan `was, at best, a clever little scheme having only the color of legality and cannot be upheld.'"

Bloomington, 916 F.2d at 1309 citing Bloomington, 699 F. Supp. at 194 (emphasis added).

fn7It is true that the appraisal originally obtained by the Bank before commencing the reverse stock split took the minority interest and lack of marketability into account, Def. App. at 35; however, this appraisal was not done in response to Weber exercising his appraisal rights under Iowa Code § 490.1302 (1)(d). Thus, this appraisal cannot support Weber's claim that the Iowa Code requires discrimination between bank and non-bank shareholders. At most, this first appraisal simply demonstrates that the Bank felt it important to take these factors into account in arriving at a fair price. If Weber was unhappy with this initial appraisal by Business Capital, Iowa Law provides that the appropriate remedy would be to invoke his appraisal rights. Iowa Code § 490.1302(1)(d). Because Weber did not exercise his appraisal rights, he cannot now challenge the fairness of the sum paid by the Bank.

fn8 There is some question as to whether the Directors would even benefit financially from the reverse stock split. Although Weber alleges that his stock was purchased at an unfair price (because of the minority and marketabilty discounts), he did not seek his appraisal remedy to challenge the price offered by the Bank. Assuming that the Bank paid a fair price, the Bank paid out the same value to retrieve the stock as it received in now owning the stock. Thus, the only real economic benefit to the Directors is the administrative

efficiency the Bank expects to realize by only having one shareholder. Nonetheless, the Court will evaluate the transaction for fairness to the corporation.

Filed: 10/25/2005

No. 05-4274

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

James E. Weber, Trustee of the James E. Weber Revocable Trust u/d 2/18/04,

Plaintiff-Appellant,

v.

Iowa State Bank and Trust Company of Fairfield, Iowa; Iowa State Financial Services Corporation; Bill Adam; Nelson Anderson; Joe Carr; Sarah Cochran; David C. Eastburn; Mike Greiner; Pat McMahon; Jay Silverman; Jon Simplot; Tom Thompson; Steve Triplett,
Defendants-Appellees.

September 5, 2006, Decided

OPINION: The petition for rehearing by the panel filed by the appellant is denied.